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IN THE
COURT OF APPEALS OF INDIANA

ANNE McNEVIN,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 29A02-0610-JV-858
	)	
DAVID DUNCAN,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE HAMILTON CIRCUIT COURT
The Honorable Judith S. Proffitt, Judge
Cause No. 29C01-0005-JP-741

June 6, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Petitioner Anne McNevin ("Mother") appeals a paternity court order that awarded custody of her child, M.D., to Appellee-Respondent David Duncan ("Father"), apportioned costs of the custody evaluation, and determined the child support arrearages of each parent. We affirm in part, reverse in part, and remand.

Issues

Mother presents eight issues for review, which we consolidate and restate as the following six issues:

I. Whether the custody evaluation should have been excluded because of the evaluator's bias against Mother;

II. Whether the findings of fact, conclusions of law and order regarding custody are clearly erroneous;

III. Whether the trial court abused its discretion by apportioning all travel costs to Mother without specifying a reason for deviation from the Indiana Parenting Time Guidelines;

IV. Whether the trial court's order that Father was not responsible for any part of Mother's childbirth costs contravened statutory authority;

V. Whether the trial court abused its discretion by ordering Father to pay child support retroactive to the date of the filing of the paternity action as opposed to the date of the parties' separation; and

VI. Whether the court lacked authority to order Mother to pay one-half the custody evaluator's fee.

Facts and Procedural History

M.D. was born on April 8, 1997. At that time, Father and Mother were living together. In November of 1999, Mother and M.D. moved out of Father's residence. On May 30, 2000, Mother filed a petition to establish the paternity of M.D. On September 12, 2000,

the trial court entered a preliminary order adopting an Agreed Entry by the parties. The Agreed Entry established M.D.'s paternity, and further provided that Mother would have temporary custody of M.D., Father would pay child support, the arrearage would be determined at a later date, and the parties would "participate in a custody evaluation." (App. 127.)

On March 26, 2001, Father filed his "Emergency Petition to Modify Preliminary Order," seeking temporary custody of M.D. pending a final custody determination. (Appellee's App. 10.) At that time, Father advised the court that the custody evaluation report of Dr. John Ehrmann ("Dr. Ehrmann") had been completed and provided to respective counsel. Dr. Ehrmann recommended that custody of M.D. be awarded to Father. On April 18, 2001, the trial court awarded Father the temporary custody of M.D. During September of 2001, Mother was placed on active United States Air Force duty. She was assigned to Wright Patterson Air Force base in Dayton, Ohio.

On January 16, 2004, Mother petitioned to modify the temporary custody and parenting time order. On May 18, 2004, the trial court conducted a hearing and ordered the parties to make appointments with Dr. Ehrmann for a supplemental evaluation. On May 19, 2004, the trial court entered an interim order providing in pertinent part, "Father is to advance the costs for said evaluation and the Court will order the distribution of said costs at the final hearing." (Appellee's App. 18.) The trial court reiterated that the April 18, 2001 order "is a temporary order for custody and support to remain in place until the final hearing which is currently set [for] August 3, 2004." (Appellee's App. 19.)

On November 1, 2005, Mother moved to strike Dr. Ehrmann's custody evaluation report and supplemental report. After a hearing conducted on March 29, 2006, the trial court denied the motion to strike. On July 11, 2006, the trial court conducted a final custody hearing. On September 11, 2006, the trial court entered its findings of fact, conclusions of law, and order awarding Father legal and physical custody of M.D., determining child support arrearages, apportioning Dr. Ehrmann's fees, and denying Mother childbirth expenses. Mother now appeals.

Discussion and Decision

I. Custody Evaluation Reports

Mother sought to have Dr. Ehrmann's custody evaluation excluded from evidence, alleging that he had developed a prior professional relationship with Father in the course of treating Father's older child, L.D., and had become biased against Mother. After a hearing, the trial court ruled that the original and supplemental reports were admissible evidence. Mother now contends that the trial court erroneously relied upon reports compiled after Dr. Ehrmann had engaged in an unethical multiple relationship and had abandoned his objectivity.

Generally, the admission or exclusion of evidence is a matter entrusted to the discretion of the trial court. Apter v. Ross, 781 N.E.2d 744, 752 (Ind. Ct. App. 2003), trans. denied. The fact-finder is not required to accept opinions of experts regarding custody, but may consider such evidence. Trost-Steffen v. Steffen, 772 N.E.2d 500, 510-11 (Ind. Ct. App. 2002), trans. denied. Reversible error may not be predicated upon an erroneous evidentiary ruling unless a substantial right of a party is affected. Ind. Evidence Rule 103(a).

Father's former wife, who is the custodial parent of L.D., testified that, in August of 2000, she took her daughter to Dr. Ehrmann for the treatment of "emotional difficulties." (Tr. 6.) She and L.D. participated in family counseling. She testified further that Father attended one session. Father testified that he could not recall that session and did not "receive any treatment from [Dr. Ehrmann] in his professional capacity" prior to the instant custody evaluation. (Tr. 24.)

Dr. Ehrmann testified and explained his limited relationship with Father prior to the commencement of the instant custody evaluation:

> Dr. Ehrmann: [I]f I am to do an adequate job I need input from both parents. I sought Robin Duncan's permission to invite Mr. Duncan, Dave Duncan, to that intake. She agreed and Mr. Duncan was there – I don't even think for the entire appointment. He provided some information in terms of his daughter and that was the last contact I had with him until the custody evaluation.
>
> Question: In the August, 2000, contact with Mr. Duncan, did you provide him personally with any professional services at that time?
>
> Dr. Ehrmann: Not at all. No.
>
> Question: Was this a collateral source of information for rendering treatment to his daughter?
>
> Dr. Ehrmann: It was.
>
> Question: Do you know if he came to see you alone or whether he was in the presence of any other person?
>
> Dr. Ehrmann: On August 15th, he was in the presence of his former wife, Robin, and his daughter, [L.D.]. I had never seen him alone prior to November 22nd of 2000, when the first custody evaluation began.

(Tr. 32.) The evidence of record indicates that Dr. Ehrmann's contact with Father prior to the instant custody evaluation was of very limited duration and focused upon L.D.'s treatment

rather than any issues between M.D., Father, and Mother. Dr. Ehrmann also testified that Mother knew of L.D.'s treatment and specifically requested that he consult with L.D.'s mother as she thought that L.D.'s concerns might shed light upon Father's parenting abilities. Mother did not demonstrate that Dr. Ehrmann was biased against her because of a previous professional relationship with Father. Moreover, the fact that Dr. Ehrmann ultimately recommended that Father have custody of M.D. does not demonstrate that he was initially biased against Mother. Mother has not established reversible error in the admission of Dr. Ehrmann's custody evaluation reports.

II. Custody

Indiana Code Section 31-14-13-1 provides in pertinent part: "A biological mother of a child born out of wedlock has sole legal custody of the child, unless a statute or court order provides otherwise[.]" Here, the trial court adopted the agreement of the parties that Mother would have "temporary" custody of M.D. Later, Father was awarded "temporary" custody of M.D. Thereafter, M.D. remained in Father's care for an extended period of time, arguably implicating a modification of custody standard, rather than an initial determination of custody standard. See In re Paternity of Winkler, 725 N.E.2d 124, 128 (Ind. Ct. App. 2000) (holding that a custody modification standard applied when the mother had custody of an out-of-wedlock child for twelve years because "the same concerns about stability and continuity present in sole and joint custody modifications are present.") But see Hughes v. Rogusta, 830 N.E.2d 898, 901 (Ind. Ct. App. 2005) (finding that the custody modification standard did not apply where the father did not acquiesce in the mother's custody but immediately filed to establish paternity and determine custody after the mother moved out). Here, with the

acquiescence of both parents, the trial court applied the statutory criteria for initial custody determinations.

Pursuant to Indiana Code Section 31-14-13-2, when the trial court is called upon to make an initial determination of custody following the determination of paternity, there is no presumption in favor of either parent and the trial court may properly consider the following factors in determining the best interests of the child:

> (1) The age and sex of the child.
> (2) The wishes of the child's parents.
> (3) The wishes of the child, with more consideration given to the child's wishes if the child is at least fourteen (14) years of age.
> (4) The interaction and interrelationship of the child with:
> (A) the child's parents;
> (B) the child's siblings; and
> (C) any other person who may significantly affect the child's best interest.
> (5) The child's adjustment to home, school, and community.
> (6) The mental and physical health of all individuals involved.
> (7) Evidence of a pattern of domestic or family violence by either parent.
> (8) Evidence that the child has been cared for by a de facto custodian, and if the evidence is sufficient, the court shall consider the factors described in section 2.5(b) of this chapter.

On appeal, this Court affords considerable deference to the trial court's custody decision, as the trial court is in a position to see the parties, observe their conduct and demeanor, and hear their testimony. Trost-Steffen, 772 N.E.2d at 509. On review, we cannot reweigh the evidence, judge the credibility of the witnesses, or substitute our judgment for that of the trial court. Id. We will not reverse the trial court's custody determination unless it is clearly against the logic and effect of the facts and circumstances before the court or the reasonable inferences drawn therefrom. Id.

Here, the parties requested findings of fact and conclusions of law pursuant to Indiana Trial Rule 52(A), which prohibits a reviewing court from setting aside the trial court's judgment "unless clearly erroneous." In re Marriage of Nickels, 834 N.E.2d 1091, 1095 (Ind. Ct. App. 2005). When reviewing the trial court's findings of fact and conclusions thereon, we consider whether the evidence supports the findings and whether the findings support the judgment. Bettencourt v. Ford, 822 N.E.2d 989, 997 (Ind. Ct. App. 2005) (citing Yanoff v. Muncy, 688 N.E.2d 1259, 1262 (Ind. 1997)). Findings are clearly erroneous only when the record contains no facts to support them either directly or by inference. Id. A judgment is clearly erroneous if it applies the wrong legal standard to properly found facts. Id. In order to determine that a finding or conclusion is clearly erroneous, our review of the evidence must leave us with the firm conviction that a mistake has been made. Id.

Here, the evidence suggests that Father and Mother are fit parents and each enjoy a good relationship with M.D. However, the relationship between the parents has been particularly acrimonious and each parent attempted to place responsibility for the lack of cooperation upon the other parent. The trial court made extensive findings of fact indicating that, during a temporary placement in Father's home spanning several years, M.D. was well-adjusted, performed well in school, and received appropriate care. Additionally, the trial court observed that Father worked at home, allowing him to provide M.D.'s after-school care and to chaperone school trips. Meanwhile, Mother's future was somewhat unsettled. Mother had been a member of the United States Air Force assigned to fly medical relief missions, but had sustained an injury that would require surgery and preclude future flight missions. At the time of the final hearing, it was unclear whether she would remain in Ohio or return to the

Indianapolis area. Mother's challenges to specific factual findings essentially request that we reweigh the evidence to reach a contrary conclusion, which we cannot do.

The trial court acknowledged Dr. Ehrmann's recommendation that Father's temporary custody of M.D. be made permanent custody, and specifically concluded, "It is in [M.D.]'s best interest that his custody continue to be with Father." (App. 21.) We do not find this determination to be clearly erroneous, as the findings of the trial court have evidentiary support, and the findings support the judgment.

III. Travel Costs

The trial court's order provided in part, "Father shall not be required to assist with transportation." (App. 21.) No reason was given for this departure from the Indiana Parenting Time Guidelines, which contemplate shared costs of transportation. See Guideline I.B.1. and Commentary 2. Father suggests that the reason was because Mother asked for a child support credit for extraordinary travel expenses, but stops short of arguing that Mother actually received such a credit. Our review of the record indicates that Mother requested a credit on her child support arrearage because she had incurred thousands of dollars of travel expenses since being stationed in Ohio. However, we cannot discern from the record that she received a credit. Nor can we discern a reason why Father should bear no cost of ongoing transportation. As such, we reverse this provision and remand for further proceedings with regard to the allocation of transportation expenses or duties.

IV. Childbirth Costs

Indiana Code Section 31-14-17-1 provides:

> The court shall order the father to pay at least fifty percent (50%) of the reasonable and necessary expenses of the mother's pregnancy and childbirth, including the cost of:
>
> (1) prenatal care;
> (2) delivery;
> (3) hospitalization; and
> (4) postnatal care.

The primary goal in statutory construction is to determine, give effect to, and implement the intent of the legislature. Shepherd v. Carlin, 813 N.E.2d 1200, 1203 (Ind. Ct. App. 2003). The best evidence of legislative intent is the language of the statute itself, and all words must be given their plain and ordinary meaning unless indicated by statute. Id. When the word "shall" is used in a statute, it is construed as mandatory unless it appears clear from the context or the purpose of the statute that the legislature intended a different meaning. Gabbard v. Dennis, 821 N.E.2d 441, 445 (Ind. Ct. App. 2005).

Here, the trial court ordered that "Mother's request for reimbursement of expenses regarding [M.D.]'s birth is denied." (App. 23.) The corresponding finding of fact provides:

> The Court finds that there is insufficient evidence to warrant an entry ordering Father to pay medical and other expenses regarding [M.D.]'s birth. No specific information was provided by Mother regarding any specific payments made or due. Further, it was indicated that Mother filed bankruptcy after [M.D.]'s birth, however, no evidence was provided to show what, if any, obligations remained due and owing following the bankruptcy discharge.

(App. 19.) This finding of fact is inconsistent with the evidence presented. Mother testified, without contradiction, that she was required to pay her prenatal and expectable childbirth expenses in advance, received a small discount for doing so, and paid "a little over $7000." (Tr. 126.) She further testified that Father contributed "none whatsoever." (Tr. 126.) M.D. was born with complications, and the bills for his medical care, after insurance payments,

were discharged in bankruptcy. The uncontraverted evidence indicates that the expenses of prenatal care and childbirth were not discharged in bankruptcy and Father has made no prior contribution. Thus, the trial court erred in concluding that Father had no liability for childbirth costs pursuant to Indiana Code Section 31-14-17-1.

V. Father's Child Support

Mother next challenges the trial court's decision not to award her child support from Father for the period of time after she left Father's residence and before the filing of the paternity action.

Indiana Code Section 31-14-11-5, governing child support following a determination of paternity, provides:

> The support order:
> (1) may include the period dating from the birth of the child; and
> (2) must include the period dating from the filing of the paternity action.

Mother did not seek child support retroactive to the date of M.D.'s birth, as she and M.D. were then residing with Father. However, she requested child support retroactive to the date that she and M.D. moved out. The trial court, without elaboration, found that "Father's obligation should commence as of May 30, 2000, thus creating a support arrearage of $2,400.00." (App. 19.)

A trial court abuses its discretion when its order is contrary to the logic and effect of the facts and circumstances before it. Barger v. Pate, 831 N.E.2d 758, 765 (Ind. Ct. App. 2005). There is evidence of record that Father paid housing expenses when Mother and M.D. resided in his home following M.D.'s birth. However, there is no evidence that Father voluntarily provided Mother with funds for M.D.'s support after they moved out. At times,

Mother worked two jobs. We are mindful that the statute employs permissive language and should not automatically be construed to require child support retroactive before the paternity petition filing. However, in this particular case, the trial court's conclusion that Father should have no child support obligation prior to the filing of the paternity petition is not supported by findings of fact consistent with the evidence of record. We therefore reverse this provision as clearly erroneous, and remand for further proceedings in the determination of Father's child support arrearage.

VI. Costs of Custody Evaluation Report

Finally, Mother argues that the trial court lacked authority to order her to share the cost of the custody evaluation.

On September 12, 2000, Mother and Father submitted an Agreed Entry for the trial court's approval, which provided in relevant part:

> The parties agree to participate in a custody evaluation, and shall cooperate in the same as required by the evaluator. The parties shall agree upon an evaluator, but if unable to do so may petition the Court for a panel. The evaluation shall be paid for by the respondent, with ultimate responsibility to be determined at a final hearing.

(App. 127.) Thus, the parties agreed to a custody evaluation and the court's determination of the proper allocation of that expense. A party may not take advantage of an alleged error that he or she has invited. Potter v. Houston, 847 N.E.2d 241, 247 (Ind. Ct. App. 2006).

Conclusion

We affirm the admission of the custody evaluation, and the allocation of costs. Further, we affirm the custody decision. However, we reverse and remand for further

proceedings with regard to the allocation of travel expenses, the determination of Father's child support arrearage, and the allocation of childbirth expenses.

Affirmed in part, reversed in part, and remanded.

SHARPNACK, J., and MAY, J., concur.